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PP v. WANIDA CHINNABUT

HIGH COURT MALAYA, SHAH ALAM
WENDY OOI SU GHEE JC
[CRIMINAL REVISION NO: BA-43-40-10-2023]
5 JANUARY 2024

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Abstract – *There is a common law duty on the part of the prosecution to disclose to the defence police statements of the witnesses (s. 112 of the Criminal Procedure Code ('CPC') witness statements) that are necessary and desirable to their case. Therefore, in respect of an application under s. 51 of the CPC, the prosecution may not, without any good reasons for non-disclosure, refuse to supply such document to the defence.*

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CRIMINAL PROCEDURE: *Revision – Application for – Sessions Court allowed application by defence during defence stage to be supplied with s. 112 of Criminal Procedure Code ('CPC') witness statements – Whether revision application meritous – Whether s. 112 of CPC witness statements privileged documents – Whether witness statements ought to be provided via application under s. 51 of CPC – Whether there was common law duty on prosecution to disclose to defence witness statements that were necessary and desirable to defence case – Doctrine of stare decisis – Husdi v. PP – Dato' Sri Mohd Najib Hj Abd Razak v. PP – Siti Aisyah v. PP*

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The accused was charged under s. 31(1) of the Child Act 2001 for the offence of child neglect, by causing physical injury towards a child which resulted in his death. At the Sessions Court, after the end of the prosecution's case, the Sessions Court Judge ('SJ') found that the prosecution had successfully made out a *prima facie* case against the accused, therefore, the accused was called to enter her defence. Accordingly, the accused was called as the first defence witness, and before her husband could appear as the second defence witness, the defence applied for an application to be supplied with recorded witness statements under s. 112 of the Criminal Procedure Code ('CPC') of the accused's husband and two children by the prosecution. The application was subsequently allowed by the SJ. Aggrieved, the prosecution filed an application for revision under s. 323 of the CPC. The issues that arose in the present revision application pertained to: (i) whether *vide* the doctrine of *stare decisis*, the court was bound to the Federal Court decisions of *Husdi v. PP* ('*Husdi*') and *Dato' Sri Mohd Najib Hj Abd Razak v. PP* ('*Dato' Sri Mohd Najib*') or the Court of Appeal decision of *Siti Aisyah v. PP* ('*Siti Aisyah*'); (ii) whether the witness statements sought by the defence privileged documents; and (iii) whether the witness statements ought to be provided *via* an application under s. 51 of the CPC.

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Held (dismissing revision application):

(1) The issue raised and addressed by the Court of Appeal in *Siti Aisyah* was almost similar to the revision at hand. The issue being – whether the prosecution could be ordered, at the end of the case for the prosecution, and where defence had been called, to furnish the accused a copy of witness statements recorded under s. 112 of the CPC of witnesses offered to the defence which were material and may assist the defence case. The Court of Appeal in *Siti Aisyah* had unanimously allowed the appeal by the defence/appellant and set aside the order of the High Court which dismissed the appellant's application under s. 51 of the CPC for the production of seven witness statements recorded under s. 112 of the CPC. Thus, by virtue of the doctrine of *stare decisis*, this court was instead bound by the decision of *Siti Aisyah*, and not by the Federal Court decisions of *Husdi* and *Dato' Sri Mohd Najib*. (paras 20-22)

(2) There are no statutory provisions which declare that witness statements shall not be disclosed. For instance, the Evidence Act 1950 which provides that certain types of communication or statements are privileged, *ie*, statements evidencing state of affairs (s. 123), official communications (s. 124), marital privilege (s. 122) and legal professional privilege (s. 126). Due to that, unless there are good reasons for non-disclosure, the prosecution has a duty to disclose and provide the documents sought by the defence in present revision. However, the prosecution had not disclosed any good reasons for non-disclosure and instead, had relied heavily on the argument that it is trite law that witness statements recorded by investigating authorities are privileged documents. As such, there was no merit in the argument raised by the prosecution. (paras 32-34)

(3) The defence had pinpointed and narrowed down the documents requested. It was submitted by the defence that the father of the deceased victim had testified that the accused's husband and two children were present at the house at the time of the incident which led to the charge in question. The presence of these three persons were further supported by the evidence of the investigating officer. Therefore, the defence clearly did not go on a frolic of his own by asking from the prosecution whatsoever documents they could lay their hands on. Instead, the documents they requested were from these three important eyewitnesses. It was undeniable that the statements would be of great importance and assistance to the defence case. Even more so when the incident happened almost four years ago and to recollect what had happened that day may not be easy. To deny the defence of the said documents would be tantamount to disregarding the principle of equality of arms in a criminal proceeding, and ultimately the right to a fair trial. Hence, the application for revision was dismissed for lack of merit. (paras 37-39 & 47)

Case(s) referred to:
Dato' Seri Anwar Ibrahim v. PP [2010] 4 CLJ 265 FC ***(refd)***
Dato' Sri Mohd Najib Hj Abd Razak v. PP [2019] CLJU 434; [2019] 1 LNS 434 FC ***(dist)***
Dato' Sri Mohd Najib Hj Abd Razak v. PP & Another Appeal [2023] 1 CLJ 672 CA ***(refd)***
Husdi v. PP [1979] CLJU 33; [1979] 1 LNS 33 HC ***(refd)***
Husdi v. PP [1980] CLJU 29; [1980] 1 LNS 29 FC ***(dist)***
PP v. Raymond Chia Kim Chwee & Anor And Another Case [1985] 2 CLJ 457; [1985] CLJ (Rep) 260 FC ***(refd)***
R v. Brown (Winston) [1998] AC 367 ***(refd)***
R v. Lawson [1990] 90 Cr App R 107 ***(refd)***
R v. Stinchcombe [1991] 3 SCR 326 ***(refd)***
R v. Ward [1993] 2 All ER 577 ***(refd)***
Siti Aisyah v. PP [2019] 7 CLJ 27 CA ***(foll)***
Suruhanjaya Sekuriti v. Datuk Ishak Ismail [2016] 3 CLJ 19 FC ***(dist)***

Legislation referred to:
Child Act 2001, s. 31(1)
Criminal Procedure Code, ss. 51, 112(3), 113(2), (3), (4), (5), 323
Evidence Act 1950, ss. 32(1)(i), (j), 122, 123, 124, 126, 127, 128, 129

For the prosecution - Mohamad Firdaous Mohamed Idris; DPP
For the appellant - K Theivaendran; M/s Desmond Ho & Assocs

Reported by Syamim Ariffin

JUDGMENT

Wendy Ooi Su Ghee JC:

Introduction

[1] An application for revision under s. 323 of the Criminal Procedure Code ('the CPC') was made to this court to revise the order of the learned Sessions Court Judge dated 27 October 2023.

[2] In the said order, the learned Sessions Court Judge allowed the application by the defence to be supplied with the statement of Mohd Zarudi bin Mustapha ("the accused's husband") recorded under s. 112 of the CPC as well as transcripts of the interviews with the accused's two children, namely Nor Wadina binti Mohd Zarudi and Nor Wani Sofiya binti Mohd Zarudi ("the documents"). The learned Sessions Court Judge also ordered the documents be supplied by the prosecution to the defence within three days from the date of the said order.

[3] Aggrieved by the said order, the prosecution filed the above said application for revision by virtue of a letter dated 31 October 2023, thus seeking this court to exercise its revisionary powers to set aside the said order.

Background

[4] The accused was charged under s. 31(1) of the Child Act 2001 for neglect of a child by the name of Izzhan Haris bin Irwan Shafiq thus causing him physical injury which eventually led to his death.

[5] On 26 July 2023, the trial judge found that the prosecution has made out a *prima facie* case against the accused. Accordingly, the accused was ordered to enter her defence in which she did where she appeared as the first defence witness on 22 August 2023.

[6] However, on 10 October 2023, prior to the calling of the accused's husband as the second defence witness, the defence applied for the said witness' statement recorded under s. 112 of the CPC. Initially, the prosecution intended to call the accused's husband as one of the witnesses. However, he was not called as a prosecution witness nor offered by the prosecution to the defence at the close of the prosecution stage.

[7] The defence also sought to be supplied with the transcripts of the interviews with the accused's children Nor Wadina binti Mohd Zarudi and Nor Wani Sofiya binti Mohd Zarudi.

[8] On 27 October 2023, upon hearing the submissions by both the prosecution and the defence, the learned Sessions Court Judge allowed the application by the defence and ordered the documents sought be supplied by the prosecution to the defence within three days from the date of the said order.

Findings By This Court

[9] In this revision herein, the pertinent issues to be addressed are as follows:

(i) the application of the doctrine of *stare decisis,*

(ii) whether witness statements under s. 112 of the CPC ("s. 112 statements") are privileged documents? and

(iii) whether s. 112 statements are to be provided to the defence *via* application made under s. 51 of the CPC?

[10] In respect of these issues, the relevant case laws that come to mind are the often quoted High Court decision in *Husdi v. PP* [1979] CLJU 33; [1979] 1 LNS 33; [1979] 2 MLJ 304; Federal Court decisions in *Husdi v. PP* [1980] CLJU 29; [1980] 1 LNS 29; [1980] 2 MLJ 80 and *Dato' Sri Mohd Najib Hj Abd Razak v. PP* [2019] CLJU 434; [2019] 1 LNS 434; [2019] MLJU 282; the Court of Appeal decisions in *Siti Aisyah v. PP* [2019] 7 CLJ 27; [2019] 4 MLJ 46 and the recent Court of Appeal decision in *Dato' Sri Mohd Najib Hj Abd Razak v. PP & Another Appeal* [2023] 1 CLJ 672.

[11] Understandably, these cases were cited by both the prosecution and the defence in their respective submissions in the revision before this court.

Doctrine Of *Stare Decisis*

[12] Briefly, it was the contention of the prosecution that based on the doctrine of *stare decisis*, it is the Federal Court decision in *Dato' Sri Mohd Najib* (*supra*) and not the Court of Appeal decision in *Siti Aisyah* (*supra*) that binds this court in respect of the issues raised in the revision herein. As such, the prosecution submitted that the application for the documents by the defence to be dismissed.

[13] However, it is the finding of this court that the cases of *Husdi* (*supra*) as well as both cases of *Dato' Sri Mohd Najib* (*supra*) are distinguished from the revision herein. The distinguishing factor being the aforesaid four cases involved applications by the defence for the production of the s. 112 statements prior to the commencement of the trial, *ie*, in advance of the trial akin to a pre-trial discovery in a criminal proceeding.

[14] Unlike the cases of *Husdi* (*supra*) and *Dato' Sri Mohd Najib* (*supra*), where the applications for s. 112 statements were made prior to the commencement of the trial, the defence in this revision applied for the same at the defence stage.

[15] It was submitted by the defence based on p. 2 of the notes of evidence, the witness statement sought for is from the accused's husband whom the prosecution initially intended to call as a prosecution witness. However, the prosecution subsequently decided against it and the accused's husband was also not offered to the defence. Hence, the danger and risk of witness tampering by the defence no longer becomes an issue since the accused's husband is now the defence witness. And one certainly does not tamper with one's witness. As such, the cases of *Husdi* (*supra*) and *Dato' Sri Mohd Najib* (*supra*) are distinguished on the facts whereupon the decisions made therein do not bind this court.

[16] Furthermore, the Federal Court in both *Husdi* (*supra*) and *Dato' Sri Mohd Najib* (*supra*) had the opportunity to hold the denial of such applications to apply across the board regardless of whether the application were made prior to or during the commencement of the trial or even at the defence stage. Yet in both cases, the Federal Court chose not to do so.

[17] In fact, the Federal Court in *Dato' Sri Mohd Najib* (*supra*) could have set aside the Court of Appeal decision in *Siti Aisyah* (*supra*), yet once again, it chose not to do so.

[18] As such, it can be inferred that the decisions made by the Federal Court in both cases only meant for the applications made prior to the commencement of the trial. Hence, the fear and risk in the tampering of the witnesses by the defence as noted by the Federal Court is clearly justified.

[19] That being said, such risk and fear are no longer present once the defence calls a witness which was initially intended to be a prosecution witness. The same person notwithstanding was once a potential prosecution witness is now a witness for the defence. As stated earlier, one certainly does not tamper with one's own witness.

[20] Conversely, similar to the facts leading to the revision herein is the case of *Siti Aisyah* (*supra*). In fact, the issue raised and addressed by the Court of Appeal in *Siti Aisyah* (*supra*) is also almost similar to the revision at hand. The issue being – whether the prosecution can be ordered, at the end of the case for the prosecution, and where defence has been called, to furnish to the accused a copy of witness statements recorded under s. 112 of the CPC of witnesses offered to the defence which are material and which may assist the defence case.

[21] The Court of Appeal in *Siti Aisyah* (*supra*) unanimously allowed the appeal by the defence/appellant and set aside the order of the High Court which dismissed the appellant's application under s. 51 of the CPC for the production of seven witness statements recorded under s. 112 of the CPC.

[22] Thus, by virtue of the doctrine of *stare decisis*, this court is instead bound by the decision of *Siti Aisyah* (*supra*) and not the Federal Court decisions in *Husdi* (*supra*) and *Dato' Sri Mohd Najib* (*supra*).

Privileged Documents

[23] The prosecution also referred to the Federal Court decision in *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* [2016] 3 CLJ 19; [2016] 1 MLJ 733 in his argument on the application of s. 124 of the EA 1950 to s. 112 statements.

[24] Coincidentally, the case of *Suruhanjaya Sekuriti* (*supra*) and the argument on the application of s. 124 of the EA 1950 to s. 112 statements were also raised and argued by the prosecution in *Siti Aisyah* (*supra*). It was contended by the prosecution that the Federal Court in *Datuk Isha*k (*supra*) considered the s. 112 statements were protected from disclosure under s. 124 of the EA 1950.

[25] On this note, the Court of Appeal in *Siti Aisyah* (*supra*) distinguished the case of *Datuk Ishak* (*supra*) as follows:

> [79] The distinguishing factor, in our view, was that disclosure there was sought for civil proceedings and, unlike the instant case, the Federal Court relied heavily on the contents of an affidavit filed by the investigating officer of the appellant before concluding that the statements were recorded in official confidence and that disclosure was not in the public interest.

[26] Accordingly, this court adopts the findings of the Court of Appeal in *Siti Aisyah* (*supra*) in distinguishing the case of *Datuk Ishak* (*supra*) in this revision herein.

[27] Further, as held by the Court of Appeal in *Siti Aisyah* (*supra*), s. 124 of the EA 1950 does not apply to the police statements in question as they were not communications made to a public officer in "official confidence". The privilege under s. 124 of the EA 1950 is analogous to information provided by informers, for example, where there is a confiding of secrets followed by a corresponding promise of secrecy.

[28] Conversely, the statements and transcripts requested in the revision herein are from the husband and children of the accused. As such, these statements and transcripts are not made in "official confidence" but by the coercive process of the law. There is no *quid pro quo* of communicating information on the basis of secrecy and confidence here. Accordingly, there was also no duty to preserve confidence and there cannot then be any breach of confidence.

[29] The Court of Appeal in *Siti Aisyah* (*supra*) also disagreed with *Husdi* (*supra*) that police statements are absolutely privileged based on the following findings:

(i) under s. 112(3) of the CPC, the person giving a police statement 'shall be legally bound to state the truth'. If the police statement is found to be false, its maker can be charged for giving false evidence under the Penal Code and its maker cannot claim that the communication between him and the police officer is privileged and therefore not admissible in evidence;

(ii) there are no statutory provisions which allow for disclosure of police statements, there are also no provisions which declare that such police statements shall not be disclosed. Unlike documents evidencing affairs of state (s. 123 of the EA 1950), for official communications (s. 124 of the EA 1950), communications during marriage or marital privilege (s. 122 of the EA 1950), and professional communications between an advocate and his client or legal professional privilege (ss. 126 to 129 of the EA 1950) where these provisions prevent the relevant parties from being compelled to disclose such communications to anyone including the court except as provided;

(iii) the fact that paragraphs s. 32(1)(i) and (j) of the EA 1950 are to be independent of each other and to be read disjunctively resulting in the admissibility of statements which fail within the four categories of persons mentioned therein; and

(iv) statutory law allows such s. 112 statements to be admitted in evidence in certain circumstances. For example, s. 113(2) of the CPC provides that the court can intervene and order production of s. 112 statements for the purposes of challenging and impeaching the credit of witnesses. Similarly, s. 113(3), (4) and (5) of the CPC allows s. 112 statement be admitted in evidence under the said subsections.

[30] Notwithstanding the Court of Appeal in *Dato' Sri Mohd Najib* (*supra*) held that witness statements recorded by investigating authorities are privileged documents, they are however, not absolutely privileged based on the abovesaid reasons stated in *Siti Aisyah* (*supra*).

[31] The Court of Appeal in *Dato' Sri Mohd Najib* (*supra*) also acknowledged that there are no statutory provisions which give the right to inspect such statements. Hence, the reason for not disclosing was to avoid the real danger of tampering with witnesses.

[32] Accordingly, as held by the Court of Appeal in *Siti Aisyah* (*supra*), there are also no statutory provisions which declare that such police statements shall not be disclosed. For instance, unlike the Evidence Act 1950 (EA 1950) which provides certain types of communication and statements as privileged, *ie*, statements evidencing state of affairs (s. 123 of the EA 1950), official communications (s. 124 of the EA 1950), marital privilege (s. 122 of the EA 1950) and legal professional privilege under s. 126 of the EA 1950.

[33] Hence, unless there are good reasons for non-disclosure, the prosecution has a duty to disclose and provide the documents sought for by the defence in the case for this revision herein. However, the prosecution did not disclose any good reasons for non-disclosure, instead relied heavily on the argument that it is trite law that the witness statements recorded by investigating authorities are privileged documents.

[34] Be that as it may, the analysis and findings of this court on privileged documents and absolutely privileged documents are as abovementioned. As such, this court finds no merit in the argument raised by the prosecution.

Section 51 Of The CPC

[35] The next question for this court to consider was whether the defence had fulfilled the dual requirements of necessity and desirability under s. 51 of the CPC. Section 51 of the CPC states as follows:

51. Summons to produce document or other things

(1) Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding under this Code by or before that Court or officer, such Court may issue a summons or such officer a written order to the person in whose possession or power such property or

A document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce any property or document shall be deemed to have complied with the B requisition if he causes the property or document to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed to affect the provisions of any law relating to evidence for the time being in force or to apply to any postal article, telegram or other document in the custody of the postal or telegraph authorities.

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[36] The application under s. 51 of the CPC and the principles related thereto, namely, the requirements of "necessary or desirable" were clearly laid down in the Federal Court decisions in *PP v. Raymond Chia Kim Chwee & Anor And Another Case* [1985] 2 CLJ 457; [1985] CLJ (Rep) 260; [1985] D 2 MLJ 436 and *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265; [2010] 2 MLJ 312. In short, the dual requirements of necessity and desirability were aimed to eliminate the roving or fishing expedition by the defence in asking for documents in the general sense.

[37] By comparison, the defence herein has pinpointed and narrowed down E the documents requested (*ie*, the s. 112 statement of the accused's husband as well as the video interview transcripts of the accused's two children). It was submitted by the defence based on p. 191 of the notes of evidence, that the father of the deceased victim testified these three persons (*ie*, the accused's husband and two children) were in the house at the time of the F incident which led to the charge in question. The presence of these three persons were further supported by the evidence of the investigating officer as submitted by the defence based on pp. 243 to 244 of the notes of evidence.

[38] Hence, the defence clearly did not go on a frolic of his own by asking from the prosecution whatsoever documents they could lay their hands on. G Instead, the documents they requested and sought for were from these three important eyewitnesses. Undeniably, their statements would be of great importance and assistance to the defence case. Even more so, when the incident happened almost four years ago and to recollect what had happened that day may not be as easy as it seems.

H **[39]** Thus, to deny the defence of the said documents would tantamount to disregarding the principle of equality of arms in a criminal proceeding, and ultimately the right to a fair trial.

[40] As such, this court finds the argument by the prosecution that the defence could always interview the witnesses (*ie*, the accused's husband and I two children) and that there was no suppression of evidence by the prosecution is without merit.

[41] Reference is made to the much quoted judgment of Parker LJ in *R v. Lawson* (*supra*):

> ... It should be borne in mind, however, that an inflexible approach to these circumstances can work injustice. **For example, the witness' memory may have faded when the defence eventually seek to interview him. Or he may refuse to make any further statement**. The better practice is to allow the defence to see such statements unless there is good reason for not doing so.
>
> (emphasis added)

as well as the judgment of Harmindar Singh JCA in *Siti Aisyah* (*supra*):

> [83] Also, without the witness statements, the defence would run the risk of impeachment of such witnesses by the prosecution through the use of the police statements in their custody. This would certainly offend the equality of arms principle and the jurisprudence that has spawned from it.

[42] Ultimately, it all boils down to the element of fairness in a trial to both the prosecution and the defence (*ie*, equality of arms principle). The English common law clearly laid down the principles that unless there are good reasons for non-disclosure, the prosecution has a duty to disclose and provide, from the unused material, witness statements to the defence (see *R v. Lawson* [1990] 90 Cr App R 107; *R v. Ward* [1993] 2 All ER 577 and *R v. Brown (Winston)* [1998] AC 367 which were referred to in *Siti Aisyah* (*supra*).

[43] Echoing the Supreme Court of Canada decision in *R v. Stinchcombe* [1991] 3 SCR 326, where it was recognised that '... the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done' (per Sopinka J at p 333).

[44] *R v. Stinchcombe* was also referred in *Siti Aisyah* (*supra*) where in line therein, it was held by the Court of Appeal:

> [68] Simply put, the duty of the prosecution is to act fairly. They are certainly not obliged to lead evidence which may undermine their case, but fairness requires the unused material in its possession, which may undermine its case, or be helpful to its adversary, be disclosed to the defence. **The duty as a prosecutor should never be one bent on securing a conviction at all costs thus risking injustice**.
>
> (emphasis added)

[45] Thus, unless and until the decision in *Siti Aisyah* (*supra*) is set aside by the Federal Court or by a later Court of Appeal which decision differs from that of *Siti Aisyah* (*supra*), the Court of Appeal decision in *Siti Aisyah* (*supra*) is still a good law in respect of application for s. 112 statements of witnesses at the defence stage.

[46] Accordingly, bound by the decision in *Siti Aisyah* (*supra*), this court finds there is a common law duty on the prosecution to disclose to the defence the police statements of the witnesses which were necessary and desirable to their case.

Conclusion

[47] After having carefully considered the submissions by both parties, this court finds no plausible reason to disturb the order granted by the learned Sessions Court Judge. The application for revision is hereby dismissed for lack of merit.